No. 583.

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In the Supreme Court of the United States.

OCTOBER TERM, 1897.

JOHN ANDERSEN, PLAINTIFF IN ERROR,
v.
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STATEMENT.

On December 23, 1897, the plaintiff in error, John Andersen, was convicted in the circuit court of the United States for the eastern district of Virginia of the murder, on August 6, 1897, of William Wallace Saunders, on an American vessel on the high seas off the coast of Brazil. Saunders was the mate and Andersen the cook on the three-masted schooner *Olive Pecker*.

The case was tried before Goff, circuit judge, and Hughes, district judge. The uncontroverted facts ap-

pear in the preliminary statement of the bill of exceptions (Record, pp. 8 and 9).

> Be it remembered that the American three-masted schooner *Olive Pecker* sailed from Boston, Mass., on the 20th day of June, 1897, for Buenos Ayres, South America, with a cargo of lumber under and on deck. She had on board a captain, J. W. Whitman; a mate, William Wallace Saunders, sometimes called William Saunders; an engineer of a donkey engine, William Horsburgh; a cook, viz, the defendant, John Andersen, and four seamen, viz, Martin Barstad, a native of Norway; John Lind, a native of Sweden; Juan de Dios Barrial, a native of Spain, and Andrew March, a native of Newfoundland; that the said *Olive Pecker* was an American vessel, belonging to citizens of the United States; that the said vessel proceeded from Boston on her course to her port of destination until the morning of August 6, 1897, when, on the high seas and about 100 or 150 miles off the Brazilian coast, between 9 and 10 o'clock on that morning, the captain, Whitman, was shot in his cabin, and shortly thereafter the mate was shot on the left-hand side of the forecastle head *and his body immediately thrown into the sea*. The body of the captain was also thrown into the sea. Several hours thereafter the said vessel *Olive Pecker* was burned, and the cook, engineer, and four seamen took to the sea in an open boat. Twenty-eight or thirty hours thereafter they reached the Brazilian coast, where, having spent the night on shore, they separated the next morning, the accused and John Lind going in a northerly direction and the other four going in a southerly direction. That the accused and Lind, within a few days, reached Bahia, in Brazil. Both shipped, the accused on a vessel called the *Bernadotte*, bound for Pensacola, in the United States, and Lind on a Brazilian barkentine, bound for some point in Spain.

The other four men, having the Spaniard as their spokesman, he being familiar with the language of the country, and not finding an American consul, made known to the Brazilian authorities what had transpired on the *Olive Pecker*, with the request that telegrams be sent along the coast for the arrest of the accused, John Andersen. These four men, having secured passes on a vessel to Bahia, arrived there several days after the arrest of the accused and were placed in charge of the American consul at that port. The accused handed to the American consul a statement in his own handwriting, purporting to be an account of the voyage of the *Olive Pecker*, and also made to the American consul a sworn statement, as did also the other five men, which said statements were duly transmitted to the Department of State at Washington, and upon the call of defendant's counsel were produced for his use at the trial, but were not produced in evidence.

At the direction of the Government at Washington, the American consul at Bahia kept the accused and the five men in custody at Bahia until the arrival at that port some time in the month of September, 1897, of the United States man-of-war *Lancaster*, when they were put on board of that vessel and brought into Hampton Roads, Va., in the eastern district of Virginia, that being the first district into which the accused was brought after the commission of the alleged offense; and the said accused, together with the five men, was turned over by the officers of the *Lancaster* to the United States marshal on the 7th day of November, 1897, and were duly placed in confinement in the city jail at Norfolk, Va.

The bill of exceptions contains all the testimony, both on the part of the Government and the accused, introduced at the trial. In addition to the members of the crew, Barstad, Lind, Barrial, March, and Horsburgh, the

Government introduced Thomas John Newton (Record, p. 13), a clerk in the State Department, who identified the original statements made by the accused and the crew before the consul at Bahia; A. J. Hall (Record, p. 13), who built and sailed the schooner for seven years, to describe the character of the vessel; Robert McGeouch (Record, p. 16), a superintendent of stevedores at Boston, who loaded the vessel and described how this was done; John Taylor (Record, p. 16), master at arms on the *Lancaster*, who identified the accused as the man brought from Bahia to Norfolk, and Thomas H. Cross (Record, p. 16), deputy United States marshal, who received the accused at Norfolk.

The accused testified in his own behalf (Record, p. 56); called Walter Small (Record, p. 93), a captain who had employed Andersen as cook for six months in 1895, and John Asberg (Record, p. 93), a millwright in Boston, who had known Andersen some fifteen years ago, who testified as to Andersen's character and reputation; and John Darnhardt (Record, p. 96), who was offered to prove the general reputation of Captain Whitman, of the *Olive Pecker*.

In rebuttal the Government introduced the testimony of the members of the crew and also of John J. McCarthy (Record, p. 110), a police officer in Boston, Peter C. Etheridge (Record, p. 111), a police officer in Boston, John G. Mariner (Record, p. 112), a shipping commissioner in Boston, and John C. Williams (Record, p. 113), a newspaper correspondent of the New York Herald, stationed at Washington.

THE FACTS OF THE MURDER.

The tragedy of the *Olive Pecker*, the murder of the captain and mate, the capture and burning of the ves-

sel, and the attempted escape in an open boat to the Brazilian coast, is graphically described in the testimony of the members of the crew. I quote from the record the salient facts.

The captain, Whitman, was the only American on board this vessel; the mate, Saunders, was a Nova Scotian; Horsburg, the engineer of the donkey engine, was a Scotchman; Andersen, the cook, a Swede; of the seamen, Barstad, a Norwegian; Lind, a Swede; Barrial, a Spaniard, and March, a native of Newfoundland.

MARTIN BARSTAD, a Norwegian sailor, was at the wheel in the wheel-house when the mate was shot, between 9 and 10 o'clock of the morning of August 6, 1897. He says (Record, pp. 16–18):

> I heard a report of a shot in the captain's cabin, which was connected with the wheelhouse by the after companionway. Immediately afterwards I saw John Andersen, the accused, come running up the after companionway and through the wheelhouse, with a pistol in each hand and one in his hip pocket. He ran up to John Lind, who was standing amidship by the rigging of the middle mast. He said something to Lind, but I did not hear what it was. *I heard him sing out to the mate, Saunders,* who was up on the crosstree of the foremast at work in the rigging, and say, "*Come down, Mr. Saunders.*" The mate said, "What do you want, steward?" In a little while the mate finished the job and started down the rigging. When about midway down, and when the cook, Andersen, was standing on top of the forward house, the mate started down, and said: "*What you got in your hands, cook?*" "*I got guns,*" he says. "*Where you get them?*" says the mate. "*Down in the cabin,*" he says. The mate came down and stepped on the forecastle head, not on the forecastle house. Then Andersen fired a shot. The mate reeled and faced him, and said: "*For God's sake, don't shoot me,*

cook." The cook fired another shot, and the mate kept on reeling; and the cook fired another one and a third one, when the mate fell, and *he shot him once after he had fallen.* Then the cook sung out to the men who were in the forecastle, "*I am in charge of this vessel; I am next to the mate.*" He sung out again: "*Won't you fellows come out?*" They came out and I saw them throw the mate's body overboard. I was at the wheel all the time. Then he marched the whole gang aft and went down in the cabin and brought the captain up and threw him overboard. He then said: "If any man like, he can put me in irons." He had two or three pistols, *one in his hand then.* He had said he was in charge of the vessel and had ordered the men to throw the mate and captain overboard. I was at the wheel all the time. Then he says: "Boys, come down and have a drink." He went down in the captain's cabin and handed out a bottle of whisky, about two parts full. He gave each a drink and took one himself. Then he marched the whole gang up on deck, just outside the door of the wheelhouse, and said: "*You know all you men is guilty for helping me throw the bodies over the side.*" The Spaniard told him to keep the vessel off, to clew up the gaff topsails and jibs, the outer jib, and make for port. The cook said: "*Damn; you want me to get hung.*" We said, "No, Steward; we don't want you to get hung." All the time he was armed. After a little he said to the Spaniard: "You the only sensible man amongst the crowd; I want to speak to you." Then he called John Lind afterwards and spoke to him. I don't know what he said. He ordered the men to do so and so. I left the wheel and went to the forecastle. The rest of the men came forward to get their clothes. He ordered us to get our best clothes and no more; *he said, take no discharges, bank books, nothing.* He ordered the men down in the booby hatch to get up a barrel addressed to the American consul at

Buenos Ayres. Then he told me to go down in the galley to tap some paraffine oil. I said, "No." He says, "*You go*," *and handed his pistol in my face.* "All right," I says, "Steward." I filled three buckets and passed them up, and Andrew March took it and threw it on the deck load. He was standing there armed all the time. Then he, the cook, ordered me to take the wheel. I went. The first fire commenced at the booby hatch; the next was forward. The boat was lowered and provisions put in it. We then got in the boat. I was the last man to get in. Then we hoisted sail in the boat, and *as we started the cook fired three shots, saying "That is man-of-war style."* He got the cartridges he loaded his pistol with out of the captain's drawer. I saw him pull the drawer out. He took a whole package and put some loose ones in his pocket. Then I told John Lind this shooting was not done yet. The schooner was burning a long time after we left her. I could see the glare late in the night. We saw a steamer's lights coming toward us about dark the evening we left the *Olive Pecker*. The Spaniard was at the tiller. The steamer looked like it was coming down on us. The cook took the tiller from the Spaniard and nearly upset the boat. He says, "If they come down and pick us up, I will pop them." It was 12 or 1 o'clock when we left the *Olive Pecker*. No vessels were in sight which could have picked up the bodies of the mate and captain. On the way to the shore in the sailboat the cook told us if we were picked up by any vessel we would tell that the captain and mate went down in the booby hatch to try to put a fire out, and the mate came up on fire and jumped overboard, and the captain stayed down and never came up no more. We landed about 8 or 9 o'clock of the evening of the day after we left the *Olive Pecker* at some point on the Brazilian shore. We made a tent of the boat sail and spent the night there. The next morning we drew lots to see

who should go together, having decided to go in twos. Me and Andrew March drew for partners and Horsburgh and the Spaniard, and John Andersen and John Lind. When we parted the cook fired three shots. It made us step quick. John Andersen and John Lind went in a northerly direction and the rest of us in a southerly direction. We four walked till we got to a small village and asked for an American consul. The Spaniard did the talking; he could speak the language—the Portuguese language. We got a night's lodging there. The next morning the Spaniard went to the head of the police. The Spaniard was told that a steamer was coming in that day, bound for Bahia. The police authorities got passage for us on to Bahia. We went on to Porto Seguro and there gave statements to the Brazilian authorities. The captain of the steamer, at the request of the Spaniard, telegraphed on to Bahia to arrest John Andersen and John Lind. When we got to Bahia Andersen and Lind were in jail. We went to the American consul there and made our statements. Then we were kept there by the consul till transferred to the American ship *Lancaster* and brought him to Hampton Roads, Va.

In answer to questions, Barstad testified that the sails were swinging to the starboard or right-hand side of the vessel, and that Andersen ran down the port or left-hand side of the vessel (Record, pp. 18, 19); the mate finished his job in the rigging, hung the marlin spike around his neck, and came down the rigging (Record, top p. 19); Andersen was standing on top of the forward house and the mate on the forecastle deck, about 3 feet lower, when he was shot. (Record, p. 19.)

Asked whether the crew burned the vessel because they were afraid, he replied (Record, bottom p. 19):

> He (the accused) said, "I *will make every s—n of a b—h as guilty as myself*." (Record, bottom p. 19).

JOHN LIND, a Swede, was standing amidships when Andersen came on deck after killing the captain. He says (Record, p. 22, 23, and 24):

> I saw Andersen just before the shooting of the mate that morning, coming up from the cabin through the after companionway and through the wheelhouse; I was standing amidships; he came up with a revolver in each hand; *he came right up to me and asked me where the mate was, and said, "I have killed the captain, and now the mate goes, too."* The mate was then aloft in the rigging of the foremast. I went then down on the lee or starboard side of the vessel to the forecastle house; I went and called the watch below in the forecastle house. I said, "*You better look out, because the cook is on deck with revolvers.*" As I was calling through the window I could not see on the left of the vessel. While I was calling to the men I heard a shot on the port side, on the forecastle head. I heard three or four shots; I don't exactly know how many. I heard the steward call to the men to come out; for all of them to come up there. He was calling the men in the forecastle house. He said he wanted us to throw the body overboard. When I came up all hands were there, except the man at the wheel, Martin Barstad. The mate was lying on the forecastle head *with his face downward. He had a marlin spike tied around his neck.* A marlin spike is used for splicing ropes—an instrument that all sailors carry aloft when they go up to splice a rope—it is carried around the neck by a long lanyard and a half hitch on the point to keep it from sticking in his legs. We threw the body overboard. Then the cook told us to come aft and get the captain's body overboard. We went in the after cabin and found the captain sitting in his chair—sitting like this, sir, *with his hands folded in his lap. He looked as if he was alive.* I saw blood on the side of his head, on the left side. We were told to take him up by

Andersen; he helped. He was taken up and thrown overboard. Andersen was armed all this time. *Before throwing the captain's body overboard Andersen took hold of the captain's arm and felt his pulse.* When the body was thrown overboard *Andersen cursed it.* The captain's body was sitting in a chair in the after cabin, near the sofa on the starboard side of the cabin. He was facing forward. I had only been in the cabin once before, when we were in Boston. On American vessels seamen do not go in the captain's cabin unless they are sent or called there. There are doors opening from the forward cabin into the after cabin, and from the mate's room into these cabins.

After the captain's body was thrown overboard Andersen told us to go down and he would give us a drink. We went down in the cabin, in the forward cabin where the dining room table was, and got a drink. I don't recollect whether Andersen drank with us or not. There was not much liquor in the bottle, a little over half a bottle, I think, not enough to make any one drunk. I didn't see any one drunk. After taking a drink we went up on deck and talked about making the small sails fast. The Spaniard and myself suggested that the small sails be made fast and to make for land. This was not done. Andersen said: "No; keep her up to her course." She was off a little. "Keep her up to her course," he said; "*you want me to be hanged.*" He then said to the Spaniard: "You are about the sensiblest man; I want to speak to you." I did not hear what he said to him. He then called me. I went to the lee side of the wheelhouse and he asked me what I thought was best to do with the vessel. I said, "The only thing we can do now is to try to make for some land." He said, "*No; nothing is going to be done but to destroy the vessel.*" He did not say anything more to me after that. If he spoke to any of the rest I didn't see or hear it. He then ordered everything to make ready for to

leave the ship. The old boat sail was all tore up, and I started to patch that. I was engaged about it about an hour, I should think. He then gave orders to lower the boat. Me and the Spaniard lowered the boat. It was the big boat you see hanging at the stern in the picture. Me and the Spaniard did lower the boat and Andrew March went down and unhooked the tackle, and we hauled the boat up alongside the vessel and got some provisions down there. Then the cook called Andrew and he went up. After I was through with that I went up on the house again and I saw flames coming out of the after hatch. She was afire then. Then they all went down in the boat and all hands cut the boat adrift, rigged up the mast, and started to sail. The cook helped us to rig up the mast and sail. He was armed all that time with pistols. I do not think any other members of the crew had pistols. I did not see any of them have pistols. When we left the ship Andersen fired some shots. I do not recollect what he said when he fired them. There was a dog taken along in the boat. I do not know whose dog it was, but it was the only one that was on the *Olive Pecker*. The Spaniard was at the tiller when we left the burning vessel. We could see the light from the burning vessel the whole night. There were no vessels sighted after the bodies of the captain and mate were thrown overboard which could possibly have picked up the bodies. The bodies were dead, in my judgment, when they were thrown overboard. We saw a steamboat that night about 8 o'clock in the evening. It was after dark. Andersen took hold of the tiller and steered off to keep away from the steamboat. He said, when he did that, "*If they come and pick us up I will pop them*," or something like that. The next day we were told by Andersen to say, if we were picked up, that the vessel caught on fire and the captain and mate went down in the poop to see how it was, or something like that; that the mate came up in

flames and jumped overboard and the captain never came up any more. We were in the open boat about thirty hours after leaving the vessel before reaching land. We reached land the evening of the day after we left the vessel, about dark. We made tents of the boat sail and spent the night on the shore. The next morning we drew lots to see who should go partners. It fell to my lot to go with John Andersen, the cook. John Andersen and I started off together. The first place we went to was a small village, but we never stopped. The first place we stopped was Belmont. At Belmont John Andersen sold the captain's watch. I do not know if it was the captain's watch; *he sold a watch.* He sold a watch; I don't know whether it was the captain's watch or his. The dog went along with us. *He got sick the first day and John Andersen shot him.* Afterwards we met a gentleman and he promised to give us passage to Bahia on a schooner. He did so, and we came to Bahia. John Andersen shipped on a Norwegian ship, called the *Bernadotte*, bound for Pensacola, in the United States. I shipped the next day aboard a Brazilian brigantine. I was arrested the same day and John Andersen was also arrested, and we were taken up to prison. A couple of days after that the other men came there, and then we was up to give our statements to the consul in Bahia. Then we were sent to prison, waiting for the man-of-war to come and take us. The *Lancaster* did come, and we were all put aboard of her at Bahia and first landed in the United States here in Norfolk. We were turned over to the United States marshal and have been imprisoned here ever since.

In his cross-examination (Record, pp. 25–30), Lind gives an account of the difficulty between the cook and the captain that morning about the captain's dog. About 8 o'clock the captain's dog was down by the galley door and the cook threw some water on him. The

dog ran up on the deck load "hollering." The captain came up and said to the cook, "Did you throw hot water on that dog?" Andersen replied that he did not throw hot water on him: it was cold. The captain felt the dog's back and then called the cook a liar, cursed him, and struck him. Lind did not see the captain strike the cook, but heard the noise in the galley. (Record, p. 29.) Shortly after this the cook appealed to the mate, saying, "Won't you protect me till we get to port?" To this the mate replied, "Get to port? You will get killed anyhow," or something like that. (Record, p. 25.)

ANDREW MARCH, a sailorman from Newfoundland, was in his bunk when the cook called the mate down from aloft (Record, pp. 31 to 34):

> I was in my bunk that morning when I heard the steward calling Mr. Saunders down from aloft. *He sung out to him.* "*Mr. Saunders, come down from aloft*," just like that. He says, "*Mr. Saunders, come down here.*" I got out of my bed, went to the forecastle door, and looked upon the deck load, just forward of the main rigging, and saw the steward standing there on the deck load, somewhere aft of the forward cabin. He was armed. When he called Mr. Saunders down, I heard the mate ask him what he wanted. He says, "*Come down here.*" I went back to my bed then, and never heard nothing before *Mr. Saunders asked him what he had in his hand, and he told him "guns."* I was then in my bed in the forecastle. I heard him tell the mate, *when he was asked where he got the guns, that he got them in the cabin.* He was asked who they belonged to, *and he said the captain. He asked what he was doing with them, and he answered with a shot.* When I heard the first shot, I heard Mr. Saunders begging him, "*For God's sake, don't shoot me.*" He shot three shots after that. I was standing in my berth then.

I know the cook was on the house at that time. After the shooting the cook came and called us out of the forecastle. He says, "Come out here, boys, lower the boat, and put me ashore. *The captain and mate is dead, and I am in charge of this ship.*" I got out of the bed and put on my shoes in a hurry, and the cook came back a second time and says, "Come out here, won't you? Come out here, Manuel," and he says, "Yes." We went out and went on the top-gallant forecastle, and he ordered us to throw the mate overboard. The mate was lying on the forecastle head, on the left-hand side. The sails of the vessel were swinging at that time to the starboard, which left the left hand side of the vessel clear back to the wheelhouse. The cook was armed when he ordered the mate's body to be thrown overboard, and he claimed then to be in charge of the vessel. I do not remember whether he caught hold of the mate's body and helped to throw it overboard or not. *The mate had a marlin spike tied around his neck when the body was thrown overboard. A marlin spike is a big awl used to stick through the rope in splicing it. When it is used by a man going up and down the rigging a half hitch is taken over the point so it won't stick in his legs or get between the rigging going down. When it is around the man's neck it is tied with a string and with a half hitch on the point. He can't use it without taking the hitch off so as to hurt anybody with it. The top of the forecastle house, where the cook was standing when he shot the mate, is about three feet higher than the forecastle deck, where the mate was standing when he was shot.* To get to where Andersen was when he shot, the mate would have had to step up those three feet on top of the forecastle house. * * *

After the mate's body was thrown overboard we were ordered to the cabin to take the captain up and throw him overboard. The cook was armed at that time. When the mate's body was thrown overboard *Andersen swore oaths at it.* When he swore

oaths at the body, the Spaniard asked him not to curse the body that way. We all obeyed the cook and went aft and found the captain's body in the after cabin. [Here the witness identified the diagram, showing the inside of the after cabin, and marked No. 2.] The captain's body was found sitting in his chair, dead, with both arms folded in his lap. *He looked as if he was alive, with his head back on one side and a wound in the left part of his head, about an inch above the left ear.* The captain was sitting in his chair near the sofa on the starboard side of the vessel, the point marked on the diagram "A." John Andersen ordered the captain's body to be taken up and thrown overboard. Andersen was at that time armed. He assisted in throwing the body overboard. *He swore at it when the body was thrown into the sea, calling it "a mean bastard."* After the body of the captain was thrown overboard the steward ordered us to get ready the boat. He then invited us down into the cabin to get a drink of whisky. There was about two-thirds of a bottle of whisky. He drank with us. After that was done the boat was got ready. Kerosene oil was thrown over the deck load, and the ship was set on fire. Then we made for land in the sailboat. It was about two hours, I think, after the bodies were thrown overboard before we left the *Olive Pecker.* At the time these bodies were thrown overboard there was no vessel in sight which could possibly have picked them up. We sighted a steamboat that night while in the sailboat. The Spaniard had hold of the tiller, and seemed to be steering for the steamboat. John Andersen took the tiller, jibed the sail over, and very nearly capsized it. We then ran away from the steamer, and then lost sight of her. The *Olive Pecker* was burning a long time after we left her. We could see the light from her the next morning about daylight. *When in the sailboat going to shore, John Andersen made up statements that we should say if picked up. He told us to*

say that the ship caught on fire, and the captain and mate went down to put it out. The mate came up and jumped overboard, and the captain never came back. We sighted land about 5 o'clock in the evening of the day after leaving the vessel. We got to shore after night. * * *

That morning, before the captain was shot and before the mate was shot, I heard a difficulty between the cook and the captain about the captain's dog. As I was going forward from taking my dishes back from my breakfast, I heard the dog holler. I was standing on the forecastle house. I saw the dog come out and run aft. The captain came out and went to the galley and asked the cook if he had been throwing water on the dog, and he said no. The captain went back and felt the dog. Then I saw the captain go in the galley, but I did not know what he did there. This was about fifteen or twenty minutes, I think, before the captain was shot. * * * The cook's room on board the ship was in the after cabin, the same cabin in which the captain had a room. The cook waits on the captain and cooks for the officers and seamen aboard the ship. After the mate and captain were killed, John Andersen, the accused, *said he was in charge of the vessel.*

On cross-examination:

He testified that the water was thrown on the dog about half past 8. I turned in after this dog adventure, and the first intimation I had was hearing the cook calling Mr. Saunders from out of the rigging. I heard the cook calling Mr. Saunders from out of the rigging, and got up and poked my head out of the forecastle door. I saw the cook standing there with two revolvers in his hands, and I then turned and went back to my bunk. I did not look any more. I turned in because it was my watch below. Anyway, I saw this man standing there with two revolvers in his hand. *I didn't want to have any*

thing to do at all with his business at that time. The first thing I saw, after turning in my bunk and being called out, as I said, was Mr. Saunders lying out on the forecastle deck. He was dead. *There appeared to be no life in him.* I say this man intimidated us all at the pistol's point. He ordered us to throw the mate overboard. I obeyed his orders, because I wanted my life a little longer. After the captain was thrown overboard, we all went into the cabin and took a drink. I can't say that we took a drink at the pistol's point, but he made us throw the mate's body overboard. *He did not tell me that he would kill me if I did not, but I knew enough to know he would do it.* There were four of us altogether. I did not have a knife. I do not know whether I went ahead or who went ahead when we went into the cabin to take a drink. We had to throw the body of the captain overboard because the cook ordered us to do it. I took orders from the cook because he gave me to understand he was in charge of the ship. *At the time I knew he was, because he had all the guns.* It makes a big difference when he had all the arms.

JUAN DE DIOS BARRIAL, a Spaniard, was lying down when the shooting occurred (Record, pp. 36–38).

I heard the cook sing out in the door, "Come out here, boys! Come out here, quick!" "Yes, sir," says I, "let me finish dressing." He says, "Come out here. *I am in charge of the vessel.*" I went out and the first thing I saw was the mate lying on the top of the forecastle deck on the left-hand side, *with his face downward.* The cook says, "Throw him overboard," and then I says, "*Don't, cook; don't throw him overboard, he's alive.*" He says, "Throw him overboard; he's dead enough." We threw him overboard, and after we threw him overboard the cook says, "Now, go aft and pick the captain up." When he threw the body overboard *he cursed at the body.* Then he ordered the men aft to throw the

captain overboard. All the while he was armed with pistols. We went upon his orders and into the captain's cabin. When we got in the cabin we saw the captain sitting in his chair *with both hands in his lap* and his head leaning slightly to one side and on his breast. *I thought he was alive.* I saw he had a bullet to go through near the left side of his head. His body was taken up and thrown overboard. When his body was thrown overboard *the cook cursed it also.* After it was thrown over he said, "Come on, boys, I will give you a drink." We took a drink, and after we took a drink all came on deck, and I said, "We will make the stay sails and the topsails fast, and if a squall strikes her we can manage the other sails, and we go right into Rio de Janeiro, or Bahia. I sung out to Martin Barstad at the wheel, "Keep her off," and the cook says, "No; I don't want to go to the land." He was standing close to the rail, and he said, "*Do you want me to be hung? There is nothing to be done but destroy the vessel,*" he said. Then he called me and said to me, "You are the sensiblest man on board this vessel, and I want to speak to you." "All right, cook," I says. He took me on top the galley and says, "I am a murderer, and I killed these people to save my life and your lives. *Now, you fellows,*" he says, "*you are guilty of helping me throw the bodies overboard, and before you leave the vessel you will be as guilty as I am. You ain't got nothing to fear.*"

Says he, "Many a vessel leaves port and they don't know where they go, and there's nobody to look after us for a long, long time, and we will have time to run away." I told him I had nothing to fear with the vessel in port. I says, "Look here, cook; destroy the vessel; it's a terrible thing; it's worse than what you have done already. Call all hands here, and tell us what you want to do and where you want us to sail ashore, and we will help you as much as we can, and let us go into

port." "No, no," he says, "that won't do, the vessel must be burned." He ordered a small boat to be made ready, and everything was made ready and then he took us down into the cabin, and he says, "I didn't kill these people to rob the vessel. I grant you all fellows clothes out of this large chest," and we went in and everybody took some clothes and the cook says, "You fellows can put on your best clothes," and he gave me a suit of clothes, and he says, "You don't want to take anything;" so we went forward and put on our best suit of clothes, and the cook had us to pour oil on the deck. The cook called us to hurry up and spread the oil on the deck. I didn't want to do this. I went to the forecastle and the cook came and said, "What are you doing there? Come and give your hand with this oil." I says, "Yes, cook; let me finish shaving, and I go." When I went on deck I could see that the oil was all ready. It had been spread over the deck. The cook then told us to lower a boat, and it was lowered, and Andrew March unhooked the tackle and we took the boat alongside the vessel and I jumped in, too. Provisions were then put in the boat, and when everything was ready Andersen called to me, "Come up and light the fire." "Well," I says, "let me keep the lookout on the boat; it might smash against the vessel." So he called Andrew March, and the first time he called Andrew he did not come, *so he called him again in wild words and March went up.* John Lind put the boat right in the stern of the vessel. I was in the boat, and I don't know who set the vessel on fire; but she was on fire when we sailed away. I saw the light from her burning late in the night. When we sailed away from the boat I had charge of the tiller of the sailboat. It was about two or three hours after the captain and mate were thrown overboard that we left the vessel. After dark that evening we sighted lights of a steamer coming toward us. I was steering the sail-

boat to go for the steamer. When John Andersen saw this he took the tiller away from me, and in doing so jibed the boat and almost capsized her. We reached the shore on the coast of Brazil about thirty hours after leaving the burning *Olive Pecker*. We spent the night on the shore, making tents of the sail of the boat. When leaving the burning vessel John Andersen fired his pistol three times, saying, "That's American man-of-war style." While going to the shore in the sailboat he told the men if they should be taken up they must say that the *Olive Pecker* caught fire, and that the captain and mate went down in the hatch to put her out, and the captain never came up, and the mate came up with his clothes afire and jumped overboard.

Testimony of Horsburgh, the engineer, is to be found in the Record, pages 40 to 53. Horsburgh was asleep in his berth in the after cabin, the second mate's room, when the captain was shot. What he supposed was the noise of the shooting of the captain awakened him. Then Andersen came to the companionway and told him to come on deck, that he had killed the captain. (Record, p. 42.) Horsburgh came on deck and went forward along the starboard side into the forecastle, where he told the crew that the cook had killed the captain. Directly after this he heard the shots on deck, and then the cook sung out for the men to come on deck, saying (Record, p. 43), "Come out boys; I am in charge of the vessel;" and ordered the mate's body to be thrown overboard. The mate was lying on the port side of the forecastle head, with his face down, a marlinspike hanging about his neck. After the mate's body was thrown overboard the cook ordered them to go aft and throw the captain's body overboard. "We went down in the cabin and found the captain in the chair;

so we took him up on deck and threw him overboard. Then after that he told us to go down and he would give us a drink; so we went down in the cabin and had a drink." After that the cook ordered them to get the boats ready, with provisions, etc. About this time the cook sent Horsburgh to pump March. "This is the expression he used: 'Go to pump Andrew March.' He said he was frightened of Andrew March, and told me I was freckle-minded." (Record, p. 45.) Horsburgh went and told March to be careful what he said to the cook. Horsburgh's story of the burning of the vessel and the escape in the open boat to the Brazilian shore is that of the other members of the crew.

In his cross-examination, Horsburgh describes the difficulty between the captain and the cook about the captain's dog substantially as already given.

The testimony of the accused, Andersen, appears in the Record on pages 56 to 93, the main statement being on pages 58 to 65. On page 58 he describes the altercation with the captain about the dog. In trying to throw water on the dog, the bucket slipped and struck the dog, which ran howling. This brought the captain, who cursed him and struck him in the side, and sent him on top of the pots and pans on the hot stove. The captain cursed him and threatened him; and he plead with the captain not to hurt him. The captain left him standing and the mate came along, so he turned to the mate and said to him, "Mr. Saunders, won't you protect me until we get into port?" The mate turned around to him "with scorn," saying "Go to hell; you will get killed anyhow." The cook stood in the galley among the dirty dishes, looking around to see if there was any vessel, thinking if he could see one "he would

take a board and jump overboard." It was then twenty five minutes to 10 o'clock. (Record, p. 59.) He then thought of the cabin. He used to sweep and dust the cabin before 9 o'clock:

> So I started into the cabin, thinking that the captain would be on deck, and I came down in the cabin. He was sitting inside of the door in a chair like this, although bigger, and he had a bottle on this here lounge which was alongside of the stool or the chair. He glared at me and he looked fairly black in the face with rage. He blurted out and cursed me when I came into the cabin. Well, I didn't know what to do. If I should run on deck I would have to run overboard; that was the only way I have to see out of it. I commenced sweeping the cabin, and started into the mate's room first. *I saw the mate's gun lying on the shelf, and I took that down, thinking if worst comes to worst, I will have to defend myself.* So I finished the cabin and started into the captain's room. I passed by him in that direction [indicating by gesture], and he took up that bottle like this. He says, "You whore's son!" Then he took it up like this, as if to split my head open, *when I pulled my gun out and fired.* The bullet struck him in the left temple. He fell into the chair and I ran into the captain's room. *Then I thought about the mate. I ran into the captain's room then and got his two guns.* He used to keep one gun in under the pillow and one on the shelf. I ran up on the deck, and I didn't know where the mate was then. I came up to John Lind, and he was at the main rigging. *I says,* "*Where is the mate?*" He says, "*He is aloft.*" I looked up there, and I think I said something of calling him down, but I don't think I did do that. The mate came down, and before he came down to the , piece next to the rail, he says, "*Where in the hell did you get them guns?*" He says, "*And where is the captain?*" I never made no answer to him, but I stayed *on top that house there* as the mate came down, and

he had this marlin spike around his neck. I will just show you how he had it, if you please. He had this hitch on this marlin spike, as represented to you before. He came down like this, and walked up like this [indicating by appropriate gestures] (walking toward the bowsprit), and turned in this direction (to the right) and came toward me in that direction (on the starboard side). He took the half hitch out of the marlin spike like this, and the marlin spike was hanging down when he came toward me. *I was standing there and had the guns then.* I had three of them and I held them in my hand all the time. I had an apron around my waist, and I had no pockets here in the pants. He got this hitch off the marlin spike and came around to me like this [indicating by proper gesture] to take the marlin spike off his neck and shove the marlin spike into me. I pulled the gun and shot him. The first shot struck him here somewhere (in the side). He was still coming toward me, and I shot twice or three times altogether, when the man fell dead. * * * So I stood there, and John Lind—he was the man that came up first, and there was nobody else came up—so I says, "Men," I says, "ain't you coming up?" I says. In the condition I felt, I felt actually frightened of the men the way I was, because I was completely gone. *We throwed the mate overboard.* I helped them also, so far as I can remember. *And we took the captain out of the cabin and threw him overboard.*

It is unnecessary to quote Andersen's account of the burning of the vessel and the trip to shore. On cross-examination, Andersen admitted that he was about 3 feet from the mate when he shot him (Record, bottom p. 66); that he was standing on the forecastle house and the mate was down on the forecastle head (Record, p. 68). He admitted that in his statement before the American consul at Bahia, he said he got the pistol that killed the captain out of his own trunk, the fact being it was the

mate's pistol which he got in the mate's room (Record, p. 71). He admitted stating to certain gentlemen that when the captain raised from his chair to strike him with the beer bottle he was facing him (Record, bottom p. 75). He admitted that as soon as he had killed the captain, *what came into his head then was the mate* (Record, p. 76); that he got the captain's pistols; that he ran up on deck, through the pilot house where Barstad was, and up to Lind, who was standing amidships, *whom he asked where the mate was* (Record, top p. 77); that Lind told him the mate was up aloft; that he went forward and got on top of the forecastle house, and said something to the mate in the excitement; that he might have called him down (Record, p. 77).

On page 78, Record, the admission is repeated that he left the captain's cabin and ran forward on the deck load and called the mate from the rigging, where he saw him. He denied asking the men to throw the mate's body overboard (Record, bottom p. 80), but admitted he asked them to throw the captain's body overboard (Record, middle p. 81). Andersen's opinion is that it might have been two or three minutes after the mate was shot before his body was thrown overboard. He denied asking the crew to take a drink (Record, p. 82), while he admitted he may have got the whisky (Record, p. 83). He denied ordering the vessel burned, and said it was at the engineer's suggestion (Record, bottom p. 84); but admitted that he went to the Spaniard and to Lind and asked them whether they were willing to have the vessel burned (Record, p. 88). He admitted that he took the captain's watch and sold it in Belmont (Record, p. 93), and that the compass was thrown overboard before they reached the beach.

The importance of a clear understanding of the testimony in this case will become apparent in considering the really important assignment of errors. The errors assigned are set forth specifically in the Record, pages 126 and 127. I shall consider them briefly in order.

ARGUMENT.

ERRORS ASSIGNED.

I. DEMURRER TO INDICTMENT.

It appears from the record (pp. 3, 11)—

> Thereupon the said accused demurred to the said indictment on the ground that it does not specify the locality on the high seas where the alleged offense occurred, and for other reasons not assigned. Thereupon the United States joined in said demurrer as to the said cause so assigned and objected to the same being in any wise considered, for any reasons not assigned by the accused.
>
> Thereupon, after argument, the court overruled the said demurrer for the cause assigned as aforesaid, and admonished the accused that he must state any other grounds of demurrer on which he relied, as the court could not otherwise consider them. No other grounds being alleged by the accused, the said demurrer was thereupon overruled.

The indictment is to be found in the record, pages 1, 9. It is based upon the indictment in the case of *St. Clair* v. *United States* (154 U. S., 134, 135). In the St. Clair Case the accused were charged with murdering one Maurice Fitzgerald on board the bark *Hesper* on the high seas by striking and beating Fitzgerald with a weapon unknown, and thereby giving him several grievous, dangerous, and mortal wounds, and then and

there casting and throwing him from the vessel into the sea and drowning him, "of which said mortal wounds, casting, throwing, plunging, sinking, and drowning the said Maurice Fitzgerald, in and upon the high seas aforesaid, out of the jurisdiction of any particular State in the United States of America, then and there instantly died."

In the present indictment, in place of the mortal wounds inflicted by an unknown weapon, we have the mortal wounds inflicted by a pistol.

The indictment, with formal averment, charges that Andersen murdered Saunders by assaulting him with a pistol, with intent to kill him, whereby he inflicted upon Saunders—

> several grievous, dangerous, and mortal wounds; and the said John Andersen, alias John Anderson, did then and there, to wit, at the time and place last above mentioned, him, the said William Wallace Saunders, sometimes called William Saunders, piratically, feloniously, willfully, and of his malice aforethought, cast and throw from and out of the said vessel into the sea and plunge, sink, and drown him, the said William Wallace Saunders, sometimes called William Saunders, in the sea aforesaid, of which said mortal wounds, casting, throwing, plunging, sinking, and drowning the said William Wallace Saunders, sometimes called William Saunders, in and upon the high seas aforesaid, out of the jurisdiction of any particular State of the United States of America, then and there instantly died. And the grand jurors aforesaid, upon their oath aforesaid, do say that by reason of the casting and throwing of the said William Wallace Saunders, sometimes called William Saunders, in the sea as aforesaid, they can not describe the said mortal wounds with greater particularity, etc. (Record, bottom p. 10, top p. 11).

I submit that the second ground of demurrer, that the indictment states the homicide was committed by shooting and drowning, which are inconsistent means, can not be now urged, because that ground was not presented to the trial court, but if it can be urged there is no merit in it. There is no inconsistency nor obscurity in the indictment in this respect. The indictment charges that the accused shot the deceased with a pistol, and then immediately threw his body into the sea. The murderous act was continuous. It was the same as if Andersen had shot the mate while he was in the rigging and he had fallen from there into the sea. Under such circumstances it would be impossible to tell whether he was dead before he struck the water or not. If, under the circumstances shown in this case, it is necessary for the indictment to charge and the jury to find that the murdered man was either killed by the shots or drowned in the sea, the Government being required to elect and prove the specific cause of death, then conviction becomes an impossibility.

Among the uncontroverted facts set forth in the bill of exceptions are these (Record, p. 8):

Between 9 and 10 o'clock on that morning Captain Whitman was shot in his cabin, and shortly thereafter the mate was shot on the left-hand side of the forecastle head and his body *immediately* thrown into the sea.

II. THE SPECIAL VENIRE.

The record shows, page 12:

> Whereupon the prisoner, by his counsel, moved to quash the writ of venire facias for the petit jury to be used in the trial of this particular case, on the ground that said writ must show that this said venire were summoned for the trial of this particu-

> lar case and not the general venire for offenses in general to be tried at this term of the circuit court of the United States for the eastern district of Virginia. On consideration whereof the court overruled the said motion.

Then follows the list for the venire referred to. The brief of the opposing counsel is not based upon the record, but raises a new question, namely, "that it does not appear that the jury was authorized by any order of court."

This is not only new matter not based on the record, but is not justified by the history of the case. There was an order of court directing the jury to be summoned. It was not printed in the record, because the accused raised no question and assigned no error requiring it to be made a part of the record.

There is no law requiring juries to be summoned before the term begins. There is no law requiring the name of the particular person or persons to be tried to be inserted in the writ. It is true the writ for this jury was issued December 6, 1897, after the commencement of the November term, but it was issued pursuant to an order duly entered on December 2, 1897. The jury was not ordered for the sole purpose of trying John Andersen, but was directed—

> To be and appear before our judges of our circuit court of the United States for the said district of Virginia, at the fall term thereof, to be holden at Norfolk, in the district aforesaid, on the 15th day of December, 1897, to serve as petit jurors of said court at said term.

Counsel cites no pertinent law under this assignment. Section 803 has no proper bearing. The record shows that the jury was formed and impaneled in strict ac-

cordance with section 804. See minutes of trial (Record, p. 4), as follows:

> Thereupon the petit jurors heretofore summoned to attend upon this court were called and each one examined on his oath touching his qualifications to serve in this case, and from challenges and otherwise a sufficient number of jurors not being obtained, it was ordered that the marshal of this district or his deputy return forthwith jurymen from the bystanders sufficient to complete the panel.
>
> Thereupon the jurors so returned by the said marshal being each examined upon his oath as to his qualifications to serve as a juror in this case, a panel of 37 jurors were found duly qualified and free from exception. Whereupon the prisoner struck from said panel 20 of the said jurors and the United States, by its attorney, struck therefrom 5 others, leaving 12 of the said jurors duly qualified to serve.

No exception was taken by the accused to the jury so impaneled. He exercised his challenge, and when "twelve jurors qualified to serve" were sworn no exception of any kind was interposed. If the objection to the form of the writ summoning the jury had merit, it is submitted that the failure of the accused to except to the jury as selected was a waiver of this objection.

III. THE TESTIMONY OF HALL DESCRIBING THE VESSEL.

A. J. Hall testified that he built the *Olive Pecker* and sailed her for seven years. He described the vessel, the relation of the several parts to one another, so that the jury might understand the evidence of the witnesses. In connection with Hall's testimony certain diagrams of the vessel and an oil painting of it were introduced without objection. In view of his knowledge of the vessel he testified that, with a deck load of lumber a cer-

tain height, and with the vessel on the port tack, a man in the wheelhouse could command a view of the port side.

After Hall had given his testimony counsel for the prisoner moved "to strike out all testimony as to the condition of the vessel at the time of the casualty." (Record, top p. 15.) Counsel for the Government insisted that he had asked the witness nothing about that, and Judge Goff said (Record, p. 15):

> The court does not understand that he has so testified. *Anything that would bear that construction as a matter of course will be excluded from the jury.* I think it is eminently proper that the jury should understand the character of this vessel. This man is familiar with it; he built it; he has commanded it. He is detailing to the jury nothing that took place at the time of the alleged offense. He is giving the general character and situation of the vessel, so that you may understand it, which, I think, is eminently proper. As he was not on the vessel at the time of this occurrence the court will not permit him to testify about anything that took place then.

It was to this ruling the prisoner excepted. He is incorrect in stating in his brief at the bottom of page 3 that he moved to "strike out the testimony as to what was customary." He did just what the record shows—moved to strike out all the testimony as to the condition of the vessel at the time of the casualty. This motion was sustained by the court, but at the same time the court held that the testimony of Hall as to the character and situation of the vessel was competent, and in this he followed the holding of this court in the Bram Case (168 U. S., 532, 568) as to certain testimony introduced with respect to the vessel *Herbert Fuller*.

IV. TESTIMONY OF JOHN LIND.

In the cross-examination of John Lind, counsel for the accused was permitted to bring out all that occurred between the accused and the captain, and the accused and the mate, *on the day of the murder*. He narrated the trouble about the captain's dog, and the appeal of the cook to the mate for protection, and the mate's answer. It appears in the record, page 29, that the accused's counsel asked the witness to state what occurred between Anderson and the captain *that morning*, and the court said: "You may ask it." "We want all the facts in the case." After the witness had stated all that had taken place that morning, he was asked this question (Record, top p. 30):

> Do you know of any other circumstances? Had this captain been brutal or inhuman to this cook in any other way?

To this question the district attorney objected on the ground that the character of the captain and his treatment of the accused prior to this time was not an issue in this case, which was a trial for the killing of the mate, and was not a part of the *res gestæ* of this case. This objection was argued by counsel, but the court sustained the objection and ruled out the question, to which ruling counsel for the accused excepted (Record, p. 30). After this ruling counsel for the accused put other questions, prefacing them with the statement:

> I mean by the interrogatories I am going to propound now to confine myself to *that morning*.

It needs no argument to sustain the ruling of the court in this respect. Opposing counsel uses language which tends to lead this court to believe that there was

certain testimony relating to the transactions on the day of the murder which was excluded. All that occurred that day was admitted. What was excluded was the transactions between the captain and the cook prior to the day of the murder. In what way could this operate to justify or mitigate the murder of the mate?

V. OVERRULING MOTION TO DIRECT VERDICT NOT GUILTY BECAUSE DEATH RESULTED FROM SHOOTING AND NOT FROM DROWNING.

The indictment alleges that Andersen murdered Saunders by shooting and drowning him. After the Government had rested its case the accused moved the court to instruct the jury to bring in a verdict of not guilty, because the indictment charged that the mate met his death by drowning, whereas the proof showed that his death resulted from the pistol wounds. This motion the court overruled, and very properly.

In the first place, the indictment did not charge the death from drowning alone. It charged the death from shooting and drowning. In the second place, the testimony did not show conclusively that the death resulted from the pistol wounds—in other words, that the mate was dead before he was thrown overboard. Some of the crew thought the mate was dead. None of them knew he was dead, because there was no time for an examination. After shooting the mate, Andersen called the crew on deck, and ordered them, at the point of his pistols, to throw the mate overboard. The mate was then lying face down. Nobody examined him to see whether he was dead or not. They simply picked up his body and threw it overboard.

It is a conceded fact that the mate was shot and *immediately* thrown into the sea. (Record, p. 8.)

Some of the witnesses thought the mate was dead; some thought otherwise. Lind, when asked how he knew the mate was dead, said: "There was no move at all." "His hands were white." (Record, top p. 31.)

Barstad was doubtful, saying (Record, top p. 21): "I can't tell if he was dead when they threw him overboard."

March said (Record, middle p. 34): "He was dead. There appeared to be no life in him."

Barrial says (Record, foot p. 36):

> The cook says, "Throw him overboard," and then I says, "Don't, cook, don't throw him overboard; he is alive." He says, "Throw him overboard; he is dead enough."

Horsburgh says (Record, p. 51) that the mate "appeared to be dead."

VI, VII, VIII, IX. EXCLUSION OF TESTIMONY.

These assignments are similar to the fourth assignment, and grow out of the fact that the court refused to allow the introduction of evidence of the transactions of the entire voyage, limiting the testimony to the transactions of the day of the homicide. The questions were asked the accused on the stand, and were as follows (Record, p. 57):

> Now, I want to ask this question (to the witness): I want you to detail with truth to the jury everything that occurred in reference to this business, from the time you shipped on the 16th day of June until you left the vessel on the 6th day of August.
>
> (Objected to by the attorney for the United States as irrelevant, and on the ground that the Government was confined in its testimony to what occurred on the day of the alleged homicide, and that the

accused should be required to conform to the same ruling of the court.)

After argument by counsel, the court ruled as follows:

> Judge GOFF; "I have no objection to your having the accused commence in his own way and detail as to him is best, confining himself to the truth, just what took place there on the morning of that day, and without any assistance from you; but I can not permit him to detail to the jury the incidents of the voyage from the time they left Boston in June, as I understand your question to indicate."

After some discussion, counsel for the accused renewed the question, and the court said (foot p. 57):

> I must say, Mr. McIntosh, that I fail to see the pertinency of testimony as to a quarrel with the captain in June or in July. Suppose the mate was a party. The charge is that of killing Saunders in August, and the testimony must be confined to that time. You can show, if you can, what was the feeling between the accused and the mate, and that it was such growing out of previous quarrels or threats by the mate to take the life of the accused, or anything in that line which would tend to explain the standing of the parties at the time of this occurrence. Now, anything that bears upon what had taken place, so far as the mate is concerned, can go before this jury.

On page 58 of the record it appears that counsel for the accused put this question:

> Now, state to the jury all that occurred between you and the mate during that time, including all the facts and circumstances attending the 6th of August.

Counsel for the Government objected to the part of the question intended to elicit what occurred between

the mate and the cook from the time they left Boston. Then follows this from the court:

> The trouble, Mr. McIntosh, is this: In the presen condition of the testimony of this witness it is hard to see the pertinency of it now, but I do not say that it may not be pertinent. You had better first let the witness detail the transactions of the 6th of August, and if anything is developed thereby which makes it proper to bring in the previous incidents as tending to explain what took place on the 6th, it can come in.

After this the accused gave his account of the transactions the day of the homicide. After he had got through with this his counsel renewed the question (Record, p. 65):

> Now, state what trouble, if any, you had had with this mate previous to this occasion?

This question was objected to by counsel for the Government on the ground that the testimony of the witness should be confined to what occurred on the day of the homicide, and after some discussion Judge Goff delivered this opinion (Record, foot of p. 65):

> The reason I suggested to counsel for the accused that the statement as to the occurrences relating to the killing of the mate should be stated as they took place on that day, was that the testimony might be confined to a certain limit. Now, there is no doubt in the world that a party may protect his own life against the party assailing him. If he believes that he is about to suffer harm from one who is attacking, if he bases that belief upon a previous threat, if he bases that upon previous personal encounters, if he bases that upon the known brutal character of the party, the law, out of tender consideration for the frailties of human nature, will

permit him to act upon that belief and upon that understanding. But can we apply that in this case? Now, we must look at the matter as it is before the jury, as it is presented by this witness. The witness states that he had a controversy with the captain; that the captain was cruel to him. Then in that hour he turned to the mate and advised with the mate; he asked the protection of the mate. His conduct at least does not indicate that there was any feeling between him and the mate at that time. If the testimony is admissible, it is upon the theory that it must tend to explain the situation as it then existed. He had turned to the mate to ask his protection from the captain. Now, if the mate had attacked him, it would be perfectly competent for Andersen to show that the mate, previous to this day, had threatened him or had been cruel to him. We must look at the testimony as the witness has given it himself. It was the witness who sought the mate, not the mate who sought the witness. I fail to see how a party can, under those circumstances, show, either by himself or by another, that he had had a controversy with the party he is about to attack the day before or the week before, if he has had time to cool. If there had been a controversy of that kind, even under any circumstances of that kind, it does not authorize a party to take the law into his own hands. I must exclude the testimony and adhere to the intimation I gave some time ago on another ruling with reference to threats.

Directly after this ruling counsel for the accused asked the question (Record, p. 66):

> I want to ask you whether, on the day before you had a difficulty with the mate, and without provocation on your part, the mate had not attempted to throw you overboard?

Of course, this question was held improper.

It really seems as if the mere statement of the evi-

dence introduced, and the rulings of the court excluding any evidence of transactions before the day of the homicide, were sufficient to enable the court to determine properly the questions raised by these assignments.

What occurred before the 6th of August was no part of the transaction of that day. Neither did the story of Andersen lay the ground for testimony of previous transactions between him and the captain or between him and the mate.

Andersen testified in his own behalf thus: About 8 o'clock he had a difficulty with the captain about the captain's dog. The captain accused him of lying, cursed him, and struck him. No serious injury was inflicted. The mate was not present, but afterwards, when he came where Andersen was and Andersen asked for his protection, he declined with an oath to interfere. About an hour afterwards Andersen went down into the cabin. The captain looked black at him—cursed him. He then went into the mate's room and armed himself with the mate's gun. Returning into the captain's cabin, the captain arose and was about to assault him with a beer bottle when he shot and killed him. *Then he thought about the mate.* He ran into the captain's room and got his two pistols. He rushed on deck, hurried to Lind, who was amidships, and asked where the mate was. He was told the mate was aloft. He looked up and saw him there. Then he went near the foot of the mast, on the forecastle house. He called the mate down, or if he did not call him down, he waited for him.

Before the mate got down he asked Andersen where he got the guns and where the captain was. Andersen says he made no answer to this, but stayed on top of the house. Then, as he stood on the house with the guns,

and the mate was three feet below on the forecastle head, unarmed, but trying "to take the marlin spike off his neck and shove the marlin spike into me (him)," he pulled the gun and shot him. He shot him three or four times, the mate begging him not to shoot. (Record, p. 67.) Immediately after that he called the sailors and threw the mate's body overboard.

Under such circumstances, taking this transaction just as Andersen gives it, it would have been subversive of all precedents to admit evidence of transactions before the day of the homicide. Nothing which had occurred prior to that day could, under these circumstances, justify or mitigate the conduct of the accused. He armed himself for the purpose, went in search of his victim, and, finding him aloft on the mainmast at work, a position of absolute safety for the accused, called him down and killed him. He was not only the aggressor, but the forearmed and premeditated aggressor, and this upon his own showing.

It is true that he says, when he had thus armed himself, gone in search of the mate, called him from his work, stood at the foot of the mast armed and ready to receive him, that there was a marlin spike swung around the neck of the mate which he thought the mate was going to use against him, and to protect himself against the marlin spike swung around the neck of a man standing at least three feet from him, and three feet below him, he shot the mate and cast him into the sea. These are the facts upon which this plea of self-defense must be based. The poor mate was given no show. He was shot down unarmed and begging for his life. But suppose he had been armed with a deadly weapon, and had made toward Andersen as if to assault him, would

Andersen have been justified in killing him? Andersen was a mutineer. Andersen had killed the captain, and the mate knew it. Andersen had arms and was flourishing them—two guns in his hands, one in his pocket, and the mate knew it. The mate was called down; he knew what was awaiting him. If, under these circumstances, he had been armed and could have killed the desperate, dangerous murderer, it was his duty, as the officer in command of that vessel, to kill him.

Indeed, it was the duty of every law-abiding man to apprehend this outlaw. The danger to his life, which Andersen feared, was not from the mate, but from justice. It was not the marlinspike, but the rope, which confronted Andersen. To defend himself from the rope he killed the mate, cast his body and that of the captain into the sea, burned the ship, took to the open boat, gained the coast of Brazil, separated from his comrades, and shipped at the first seaport, under an assumed name, on a strange vessel. And all for naught.

> A homicide is not excusable on the ground of self-defense because of previous hostile acts or injuries, however violent, committed or inflicted by the person killed without any overt act showing danger to the slayer at the time of the killing. (Kerr on Homicide, sec. 172.)
>
> The plea of self-defense can not be interposed, and the homicide will not be justifiable where the evidence shows that the prisoner was the aggressor or that he acted in retaliation. (Ibid., sec. 172.)

The law, as laid down by this text writer, has been expressly approved by this court in *Addington* v. *The United States*, 165 U. S. Rep., 184. This court, recognizing the right of self-defense and defining it, held it did not apply in a case where the accused went to the

place where the deceased was for the purpose of provoking a difficulty in order that he might slay his adversary. The very term self-defense involves the idea of repelling some violence—some existing condition which can only be avoided by opposing force to force. When a man has proven that he has been assaulted, he is permitted to introduce evidence concerning the character of his assailant as a reason justifying his own conduct.

In this case the accused was not assaulted. He was not repelling violence, actual or threatened. He had, himself, gone where the deceased was for the purpose of a difficulty, armed with a deadly weapon, fresh from the killing of another man; gone where he saw the deceased up above him on the mast of the vessel at his work, in a position from which it was impossible for the deceased to offer him violence. Being there for the very purpose of inflicting injury upon the mate he called him down, and manifestly, from his own statement, for no other purpose than to assail him. Under such circumstances, if it were true from the evidence that the mate attempted to use the marlin pin around his neck, it would have been an act of self-defense on his part, and not an act justifying the conduct of the accused.

Another case peculiarly illustrative of the principle controlling in this instance is that of *Allen* v. *The United States* (164 U. S. R., 492); and also the case of *Harrison* v. *Commonwealth* (79 Va., 374).

Indeed this principle is nowhere more clearly enunciated than in the very case cited by opposing counsel in his brief, that of *Wallace* v. *United States* (162 U. S. R., 466), where the court uses this language: "Where a difficulty is intentionally brought on for the purpose of

killing the deceased, the fact of imminent danger to the accused constitutes no defense." This court in that case quoted with approval the language of the court in *Reed* v. *State* (11 Texas App., 509), as follows:

> A perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If, however, he was in the wrong—if he was himself violating or in the act of violating the law—and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon himself which was superinduced or created by his own wrong, then the law justly limits his right of self-defense and regulates it according to the magnitude of his own wrong. * * *

Counsel for accused has much to say about the state of terrorism of the accused brought about by the cruel and inhuman conduct of the mate and the captain. The record discloses nothing justifying such an assertion. While it was of course impossible for the accused to go into the character of the captain, and probably not entirely admissible for him to inquire into that of the mate, the record shows that no effort whatever was made to inquire into the character of the mate with respect to illtreatment of sailors. The failure to make such an attempt justifies the inference that the mate's character was good; at least the record permits no other inference to be drawn.

X. EXCLUDING REPUTATION OF CAPTAIN.

Here the accused complains that he was not permitted to ask the witness John Darnhardt concerning the general reputation of the captain, Whitman. It is a

recognized principle that, as a general rule, the character of the deceased can not be inquired into. Certainly no authority can be found justifying an inquiry into the character or reputation of Captain Whitman, who had been killed by the cook immediately prior to the killing of the mate. It would not have been admissible, for the all-sufficient reason that, whether good or bad, it could have no legal bearing upon the issue made up between the United States and John Andersen for the murder of the mate, Saunders.

Had the inquiry been made as to the character of the mate, Saunders, the question would not have been admissible until the accused had first proved that without his own wrong he had been assaulted by the mate in a manner which laid the ground for a plea of self-self-defense. This is well stated in Wharton on Criminal Evidence, sections 68 and 69; also Wharton on Homicide, section 606.

XI, XII. INSTRUCTIONS OF COURT.

Under these assignments the accused complains of the instruction of the court, submitted in the following language (Record, p. 119):

> The other felonious homicide to which I call your attention, manslaughter, is the unlawful killing of a human being without malice, either express or implied. I find it to be my duty, gentlemen of the jury, to say to you that if the defendant has committed a felonious homicide, of which you are the only judges, there is nothing before you that reduces it below the grade of murder.

This instruction was based upon the charge of Mr. Justice McKenna, when sitting as trial judge in the case of *Sparf* v. *United States* (156 U. S., 51–60). It was used

in the case at bar because the testimony before the jury, both that of the crew and that of the accused himself, imperatively demanded it in the interest of justice. The testimony of the accused necessarily excluded the possibility of manslaughter. He testified that, having killed the captain, he at once thought of the mate, armed himself, rushed on deck, called him down from aloft where he was at work, shot him, and threw his body overboard. He did not claim that there was any quarrel that day between him and the mate. He did not claim the existence of any fact which would have operated in law to reduce the crime from murder to manslaughter.

The language of Mr. Justice Harlan in the Sparf case (156 U. S., bottom of page 63) is pertinent:

> Upon a careful scrutiny of the evidence we can not find any ground whatever upon which the jury could properly have reached the conclusion that the defendant Hansen was only guilty of an offense included in the one charged or of a mere attempt to commit the offense charged. A verdict of guilty of an offense less than the one charged would have been in flagrant disregard of all the proof and in violation by the jury of their obligation to render a true verdict. There was an entire absence of evidence upon which to rest a verdict of guilty of manslaughter or of simple assault. A verdict of that kind would have been the exercise by the jury of the power to commute the punishment for an offense actually committed, and thus impose a punishment different from that prescribed by law.

In *Stevenson's Case* (162 U. S., 313) this court, speaking by Mr. Justice Peckham, expressly reaffirms the doctrine laid down in Sparf's Case, as follows (p. 315):

> The jury would not be justified in finding a verdict of manslaughter if there were no evidence

upon which to base such a finding, and in that event the court would have the right to instruct the jury to that effect.

XIII, XIV.

The refusal of the court, first, to grant a new trial, and second, to arrest judgment, respectively, do not require discussion.

The judgment should be affirmed.

JOHN K. RICHARDS,
Solicitor-General.